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No. 95-38

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

GLADYS MURRAY, On Behalf of Herself and All Others Similarly Situated (and 27 Other Individuals),

Petitioners,

v.

STUCKEYS, INC., and PET INCORPORATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

GENE R. LA SUER
DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C.
2500 Financial Center
666 Walnut Street
Des Moines, Iowa 50309
(515) 288-2500

Counsel of Record

JOHN B. RENICK
MCMAHON, BERGER, HANNA, LINIHAN, CODY & MCCARTHY
2730 North Ballas Road, Suite 200
P. O. Box 31901
St. Louis, Missouri 63131-3938
(314) 567-7350

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals appropriately determined that the District Court erred in applying the law defining the executive exemption under the Fair Labor Standards Act to the facts of this case?

2. Whether it is appropriate for this Court to grant review of a decision which is not contrary to prior decisions of this Court, the Eighth Circuit or the other Circuits and which simply holds that the District Court misapplied the law to the facts of this case?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Petitioners are former managers of retail convenience stores owned and operated by Stuckey's, Inc. At all times pertinent to Petitioners' claims, Stuckey's Inc. was a wholly owned subsidiary of Pet, Incorporated. During the course of this litigation, Pet was a subsidiary of IC Industries which was later renamed Whitman Corporation. At the time of the appeal to the Eighth Circuit Pet was not affiliated with any other corporation.

The managers filed suit claiming overtime pay and liquidated damages under the Fair Labor Standards Act (FLSA) 29 U.S.C. §§ 201 et seq. In support of their claim, the managers alleged that they worked twenty-four (24) hours a day throughout their period of employment.

The Respondents claimed that the managers were exempt from the recordkeeping, minimum wage, and overtime pay requirements of the FLSA, pursuant to § 213(a)(1), because they were executive employees as defined by the regulations of the Secretary of Labor. Under this regulation, employees must meet the requirements of a six part test to qualify as exempt employees. 29 C.F.R. § 541.1.

The matter was originally tried in the United States District Court for the Northern District of Iowa where judgment was entered for the managers. The District Court awarded back wages and liquidated damages to each manager, although not on the basis of twenty-four (24) hours worked per day. A subsequent Order was

entered awarding attorneys' fees. Respondents appealed to the United States Court of Appeals for the Eighth Circuit. After hearing oral argument, a three-judge panel unanimously reversed the District Court's decision on the back wages and damage awards to the managers and vacated the award of attorneys' fees. The Court of Appeals remanded the case to the District Court for further findings because the District Court had not made complete findings of fact and conclusions of law on all elements of the executive exemption. Specifically, the Court of Appeals remanded the case to the District Court to consider whether the managers regularly and customarily supervised two or more employees, whether the managers regularly and customarily exercised discretionary authority and whether the managers had authority to hire and fire employees.

A Petition for Rehearing and Suggestion for Rehearing En Banc filed by the Petitioners was subsequently denied. Likewise the Petitioners' Petition for Writ of Certiorari was also denied by the United States Supreme Court on January 27, 1992.

On remand, the matter was submitted to the District Court on the evidence originally offered by the parties with no further evidence offered by either party. This evidence consisted primarily of documentary evidence and witness testimony offered by way of depositions. The District Court only addressed two of three issues on remand since Petitioners stipulated the managers had authority to hire and fire employees. Despite overwhelming evidence to the contrary, the District Court resolved these two remaining issues in favor of the Petitioners and entered judgment against the Respondents.

The Respondents appealed the District Court's decision and the United States Court of Appeals again reversed the District Court and directed that the Petitioners' action be dismissed. A Petition for Rehearing and Suggestion for Rehearing En Banc filed by the managers were subsequently denied by Order of the Eighth Circuit dated April 29, 1995. Respondents' counsel on appeal received copies of the Petition for Writ of Certiorari on July 10, 1995.

SUMMARY OF ARGUMENT

No legitimate reasons are set forth in the Petition for review of the rulings by the Eighth Circuit Court of Appeals. Petitioners' contentions that the Eighth Circuit's decision conflicts with applicable decisions of this Court and that it conflicts with recent decisions of three other Circuit Courts of Appeals are without support. These contentions stem from Petitioners' inability to recognize and differentiate questions of fact and questions of law as well as from Petitioners' misinterpretation of the Eighth Circuit's rulings. Contrary to Petitioners' statements, The Eighth Circuit did not make factual findings on their own nor did it substitute its judgment of the facts for those of the District Court, without regard to the "clearly erroneous" standard of review of FRCP 52(a).

Instead, the Court of Appeals held that the District Court erred in applying the law, in the form of the Secretary's regulations and interpretations, to the undisputed facts of record. As a result, the Eighth Circuit

reached different conclusions in determining whether Respondent's proof was sufficient to establish that Plaintiff Managers satisfied all elements of the executive exemption test. To the extent the District Court's "findings of fact" were predicated on its erroneous interpretations of the applicable law, the "clearly erroneous" standard was not controlling. Nonetheless to the extent the Court found facts to the contrary, it is plainly evident from the opinion that the panel adjudged the District Court's rulings on these issues to be clear error. In so holding, it is equally evident that the Court of Appeals was mindful of the long-standing precedent under the FLSA that exemptions are to be narrowly construed and the employer is held to a strict burden of proof.

The Court of Appeals decision is entirely consistent with this Court's holdings in *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709 (1986). Simple comparison of the Eighth Circuit's decisions in Murray I and Murray II clearly delineate the fallacy of Petitioners' position. The Ninth Circuit in *Icicle Seafoods* engaged in an independent *de novo* review of the facts as found by the trial court while the Eighth Circuit specifically focused on and analyzed each of the District Court's factual bases for its findings and conclusions.

To the extent that the District Courts findings were not supported by the record, the Court of Appeals set those findings aside as "clearly erroneous." In doing so, the Court of Appeals was careful to consider all facts presented in reaching its conclusion. As the record makes clear, the majority of fact questions do not turn on credibility issues since the Petitioners presented only three live witnesses at trial. The vast majority of the evidence

in this case was presented via deposition and through various schedules, manuals and other documents offered by the parties.

Petitioners and their counsel obviously disagree with the result of the decision of the Eighth Circuit. They have, however, failed to demonstrate that the Eighth Circuit has interpreted substantive or procedural case law so as to generate a conflict among the Circuits or with controlling decisions of this Court. Further, Petitioners can present no valid argument that the decision of the Court of Appeals "departed from the accepted and usual course of judicial proceedings" so as to call for review of the decision. No other special or important reasons for granting the Petition exist. Review of the Eighth Circuit decisions are, therefore, unwarranted.

ARGUMENT

I. AN EMPLOYEE'S EXEMPT OR NONEXEMPT STATUS UNDER THE FLSA IS A QUESTION OF LAW

In Murray II the Eighth Circuit addressed the two issues decided by the District Court; whether the Petitioners "customarily and regularly" supervised at least two other employees and whether Petitioners regularly exercised discretionary powers. *See* 29 C.F.R. § 541.1. The Court held that the District Court erred as a matter of law in ruling that Respondents failed to meet their required burden of proof on these two elements. The Court of Appeals reversed the decision of the District Court and ordered the court to dismiss the claims of the Petitioners.

In seeking review of the Eighth Circuit's rulings, Petitioners remain confused about the distinctions between questions of fact and questions of law. It is well-settled that the determination of exempt or nonexempt status in this type of case is the ultimate legal issue. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986); *Walling v. General Industries Co.*, 330 U.S. 545 (1947). As this Court stated in *Icicle Seafoods* "the facts necessary to a proper determination of the legal question whether an exemption to the FLSA applies to a particular case should be reviewed by the Court of Appeals pursuant to Rule 52(a), like the facts in other civil bench-tried litigation in federal." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. at 713. Furthermore, Rule 52(a) does not prohibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Plaintiffs' counsel misstate this Court's holding in *Icicle Seafoods*. Plaintiffs construe the case to hold that the determination of the status of a particular employee under the FLSA is purely a fact question to be reversed only if clearly erroneous. Such analysis is incorrect.

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it

> believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. at 714.

Even though the law is clear, the Petitioners are unable or unwilling to accept that the only facts necessary to determination of legal questions are subject to review under the Rule 52(a) standard. In reality, the Eighth Circuit properly reviewed the necessary facts when making its determination of whether the District Court properly applied the applicable law.

As this Court noted in *Icicle Seafoods* the underlying question of how the plaintiffs spend their working time was a question of fact. However,

> "[T]he question *whether their particular activities excluded them from the overtime benefit of the FLSA is a question of law* which both parties concede is *governed by the pertinent regulations promulgated by the Wage and Hour Administrators.*" 475 U.S. at 714. (emphasis added).

In this case, what the duties and responsibilities of the store managers were and how they spent their working time were clearly questions of fact. Nevertheless, it is equally clear that the determination of whether or not their activities and responsibilities were sufficient to qualify them for the executive exemption, as defined by the regulations, involves questions of law.

II. THE EIGHTH CIRCUIT DID NOT ENGAGE IN FACT-FINDING OR SUBSTITUTE ITS JUDGMENT FOR THAT OF THE DISTRICT COURT ON THE FACTS

The Petitioners claim that the Eighth Circuit improperly engaged in fact finding contrary to the teaching of this Court's holding in *Icicle Seafoods, supra.* As previously stated, in Murray II, the District Court addressed two specific issues. In reviewing the District Court's decision, the Eighth Circuit held that the District Court's application of the legal standards was more rigid than the Department allowed. (Appendix at 12a) The Court also held that the District Court applied too cramped a view of the legal requirements for the discretionary powers test. (Appendix at 15a). In reaching its decision the Eighth Circuit methodically analyzed and reviewed the factual bases and rationale of the District Court's determination. In concluding that the District Court erred in construing the legal requirements, the panel did not engage in independent fact-finding. Rather, the Court appropriately determined that the law had been misinterpreted and misapplied to the undisputed facts.

A. Supervising Two or More Employees

In reviewing the District Court's ruling on whether the Respondents met their burden of proving that the managers supervised two or more employees, the Eighth Circuit noted that the Regulations state that an employee qualifies as an executive "if he 'customarily and regularly' supervises at least two full-time employees or the equivalent." 29 C.F.R. § 541.105(a). The court stated that

"customarily and regularly" is defined as signifying "a frequency which must be greater than occasional but which, of course, may be less than constant." 29 C.F.R. § 541.107(b). Applying this law to the undisputed fact that the store managers supervised at least two or more employees who worked 80 hours per week 98 percent of the time, the Court found that the definition of customarily and regular had been met. (Appendix at 11a).

Similarly, the Court found that although a "forty hour week is generally the equivalent of a full-time employee, the Department of Labor in applying this regulation recognizes that this is not a rigid standard." (Appendix at 11a). Additionally, the Court found that Wage and Hour regulations further provide that "unusual circumstances might occasionally justify lower standards." (Appendix at 11a). The Eighth Circuit found that the "unusual circumstances" provision which allowed for lower standards was met by the undisputed fact that some of the managers testified that they operated on a skeletal basis in the winter rather than closing altogether. Consequently, the Court held that the District Court erred in finding that the managers did not supervise two or more employees. In reaching this decision, the Eighth Circuit did not engage in independent fact finding. Rather, the Court appropriately determined that the law had been misapplied to the undisputed facts of record.

B. Exercising Discretionary Powers

The second issue reviewed by the Court was whether the Respondents failed to show that the managers exercised discretionary powers. The Petitioners argue that the

Court inappropriately substituted its judgment for that of the trial court when it held that "the district court took too cramped a view of what constitutes managerial discretion." (Petitioners' Brief at 19). This argument is a classic example of how the Petitioners have confused questions of fact and questions of law.

The District Court held that the day-to-day duties of the managers were circumscribed by the fact that the managers were required to follow company policies, training manuals, and recommended labor schedules as well as seek the approval of the regional manager before making certain decisions. Consequently, the District Court held that the manager's work was so "routinized that he had no discretion within the meaning of 29 C.F.R. § 541.107(a)." (Appendix at 37a).

On appeal, however, the Eighth Circuit held that discretionary powers under Section § 541.107(a) include opening and closing the store, scheduling employee hours, customer relations, ordering merchandise, granting discounts and markdowns, extending credit, approving checks, resolving customer complaints, inventory maintenance and implementing display techniques. (Appendix at 16a). Furthermore, the Court held that active supervision and periodic visits by a regional manager do not eliminate the day-to-day discretionary functions of the on-site manager. (Appendix at 15a). The Court also held that the undisputed testimony of the managers showed that they hired other employees, scheduled employee work hours, trained and disciplined employees, and handled customer complaints. (Appendix at 15a). Similarly, the Court found that simply because the Respondent, a nationwide company with multiple

outlets, established standardized procedures and polices to guide the individual store managers did not eliminate the finding of day-to-day discretionary powers. *See Donovan v. Waffle House, Inc.*, 26 Wage & Hour Cas. (BNA) 868, 874 (N.D. Ga. 1983); *Marshall v. Sally Beauty Co.*, 25 Wage & Hour Cas. (BNA) 672, 673 (E.D. La. 1982).

Clearly, the Court did not set aside the District Court's factual findings or substitute its judgment for that of the District Court. Instead, the Court noted that the interpretation of discretionary powers by other courts and the Secretary of Labor include duties and responsibilities not applied by the District Court. Consequently, the Court found that the District Court's application of the law to the undisputed facts was too cramped. The Court held that the District Court's factual findings were based on an erroneous application of the law.

III. FINDINGS OF FACT INDUCED BY AN ERRONEOUS VIEW OF CONTROLLING LEGAL PRINCIPLES ARE NOT BINDING

The Petitioners insist that the question of whether the employer met its burden of proving that the FLSA exemption applies requires the District Court to make inferences based on historical facts and that such historical facts can only be reviewed for clear error. The Respondents readily concede that questions of fact are involved in determining the particular activities and duties of store managers, i.e., how they spent their working time. But the teaching of *Icicle Seafoods* is that resolution of an exemption claim under the FLSA involves questions of

both fact and law. Where questions of fact are predicated on an erroneous view of the law, Rule 52(a) does not prescribe the standard of review. *United States v. United States Gypsum Co.*, 333 U.S. 364, 394 (1948). The Eighth Circuit's opinion in both Murray I and Murray II is premised on the determinations that the District Court misconstrued the law, specifically in the form of § 541.102-103, § 541.105, § 541.107, § 541.113, and misapplied it to the facts to reach the conclusion that store managers were not executive employees.

If it is assumed the District Court's holding that store managers did not satisfy the executive employee test is a finding of fact, it is apparent that this finding resulted from erroneous application of controlling legal principles. As such, it was not binding on the appellate court. *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (5th Cir. 1980), *vacated* 451 U.S. 902 (1981), *opinion on remand*, 657 F.2d 750 (5th Cir. 1981). As this Court held in *Bose v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 501 (1984), "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of fact that is predicated on a misunderstanding of the governing rule of law."

In this case, the Eighth Circuit did not substitute its judgment of the underlying facts relevant to the duties, discretionary powers and supervision of employees and the actual work they performed for that of the District Court. Rather, the Court substituted its interpretation of the legal requirements for the elements of the executive exemption, for that of the District Court. In so doing, the Eighth Circuit acted in accordance with the accepted

course of judicial proceedings for appellate courts. Respondents were and are entitled to a reversal of the District Court's erroneous interpretations of the law governing the executive exemption. Respondents were rightfully held to a higher standard of proof in claiming an exemption from the FLSA but Petitioners' suggestion that equal treatment in the appellate process should not be afforded them solely because of their employer status is entirely unfounded.

IV. THE DISTRICT COURT'S RULINGS WERE CLEARLY ERRONEOUS

In any event, if the Eighth Circuit's reversal of the District Court's rulings in Murray I and Murray II is perceived as setting aside findings of fact rather than correcting errors of law, it is apparent from the opinion that the panel found the rulings to be clearly erroneous. In *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-396 (1948), this Court held that a finding by a trial court, if it be by a judge, "is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . "

The Petitioners repeatedly stress that credibility was an important issue in this matter which should be left to the sole discretion of the trial court. However, a review of the record shows that all but three of Petitioners' witnesses testified by deposition with the remaining evidence consisting of documents. Under the Rule 52(a) standard when a case is tried to the court without a jury and fact issues are decided on written evidence, the

appellate court is just as able to determine credibility as the trial court, and thus may disregard the trial court's findings. *Orvis v. Higgins*, 180 F.2d 537, 539 (2nd Cir.) *cert. denied* 340 U.S. 810 (1950). Similarly, if the evidence is partly oral and the balance is written or deals with undisputed facts, then the appellate court may ignore the trial judge's findings and substitute its own. *Id.*

In this case, the Court held that the District Court's rejection of the Respondents' analysis of payroll records and the testimony of Anthony Naughton was error due to the highly relevant nature of the evidence. In reaching this conclusion, the Court noted that the Petitioners did not challenge the methodology of the payroll analysis nor did they attempt to impeach Naughton's testimony. (Appendix at 9a). Since this evidence consists of written documentation and undisputed facts, the Eighth Circuit clearly had the authority to ignore the trial court's finding and substitute its own judgment.

In addition, the Court noted that the District Court found that one manager, Russell Renecker, admitted that he supervised as many as eight or ten employees and never fewer than two. (Appendix at 10a). The Court also found that the District Court, while crediting this testimony and noting that there were others similar to Renecker out there "but the evidence was not presented to this court," was a clearly erroneous finding. (Appendix 10a). The Court reached this conclusion by noting that fifteen other managers testified that they also regularly supervised two or more employees, while the remaining twelve managers indirectly testified that they also supervised two or more employees. (Appendix 10a). It is clear from the language of the Court's opinion that upon a

review of the entire record it was "left with the definite and firm conviction" that mistakes had been committed. *Anderson v. Bessemer City, N.C.*, 470 U.S. 564 (1985).

Based upon the testimony of the Petitioners along with Naughton's study, the Court found that the Petitioners regularly supervised two or more full-time employees. (Appendix at 10a). Based upon this holding, the District Court's contrary findings and/or conclusions had to be clear error.

The Eighth Circuit did not construe its holdings as setting aside findings of fact, but even if the decision is scrutinized under the Rule 52(a) standard, there is no doubt that the standard was met. Furthermore, whether they are categorized as mistakes of fact or mistakes of law, the outcome would be the same. The District Court clearly erred in findings and concluding that Respondents did not meet their burden of proof to show that managers were executive employees.

V. NONE OF THE CONSIDERATIONS FOR REVIEW ON WRIT OF CERTIORARI ARE PRESENT IN THIS CASE

The Eighth Circuit correctly ruled in Murray I and Murray II that Respondents proved, as a matter of fact and of law, Stuckey's store managers met the elements necessary for exemption from FLSA wage and overtime requirements as executive employees.

Insofar as the merits of the Eighth Circuit decision are concerned, Petitioners have pointed to no appellate cases which conflict with the Court's interpretations of

the required elements for the executive employee exemption. Petitioners cannot and do not argue that the Eighth Circuit erroneously interpreted or applied the law. They simply argue that the Court should not have reversed the District Court's "findings of fact." It is apparent that the Eighth Circuit based its reversal, in both Murray I and Murray II, on perceived errors of law. However, because it found the District Court holdings to be clear error, the result would be no different whether or not the Rule 52(a) standard of review was applied. For that reason, there is absolutely nothing about this case that requires the attention of this Court.

Petitioners advance the argument as the last of their Questions Presented for Review that the Eighth Circuit has departed from the accepted and usual course of judicial proceedings. Respondents submit that such an argument borders on being frivolous. The sole basis for it is the representation that Petitioners have found no other Court of Appeals decisions which overturned findings in favor of employees on the executive employee exemption. Apparently, they did not bother to read the First Circuit's *Donovan v. Burger King Corp.*, 675 F.2d 516 (2d Cir. 1982) decision cited and relied upon as legal precedent in the Eighth Circuit's opinion. However, Petitioners' or their counsel's lack of diligence aside, whether any similar cases exist is totally irrelevant. FLSA exemption cases are peculiar because they are always dependent on individual fact situations. Petitioners' argument amounts to nothing more than saying that an award to employees should never be reversed. Such a proposition is patently absurd.

No reasonable interpretation of the Eighth Circuit opinion in this case could lead to the conclusion that the panel "dramatically departed from the accepted and usual course of judicial proceedings" or that this case "cries out for the exercise of this Court's power of supervision." (Petition at 26). The action fully comports with the principles of law enunciated in *Icicle Seafoods, supra.*

CONCLUSION

Petitioners have not shown the existence of any significant issue of substantive or procedural law, let alone special or important reasons, which call for review or supervision by this Court on writ of certiorari. The Eighth Circuit's rulings are not in conflict with the decisions of this Court cited by Petitioners nor are they in conflict with other circuits which have interpreted the burden of proof in FLSA exemption cases. The Eighth Circuit has corrected what otherwise would have been a grievous error, based on its determination that store managers clearly and unmistakenly met the terms of the executive exemption under 29 C.F.R. § 541.1. The case should be

returned to the District Court for further proceedings in accordance with the opinion.

Accordingly, the Petition should be denied.

Respectfully submitted,

GENE R. LA SUER
DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C.
2500 Financial Center
666 Walnut Street
Des Moines, Iowa 50309
(515) 288-2500

Counsel of Record

JOHN B. RENICK
MCMAHON, BERGER, HANNA, LINIHAN, CODY & MCCARTHY
2730 North Ballas Road, Suite 200
P. O. Box 31901
St. Louis, Missouri 63131-3938
(314) 567-7350

Attorneys for Respondents